92-1661

No. _____

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

JAMES ROBERT WINKLEMAN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Case No. 90-50109

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in upholding the district court's exclusion of evidence negating three essential elements of the crime charged, thereby denying Mr. Winkleman his fundamental right to defend himself and to have a jury determination upon all essential elements of the crime?

2. Did the Ninth Circuit Court of Appeals violate Mr. Winkleman's due process rights by upholding the district court's imposition of a sentence lacking any reasonable or rational basis, where the district court failed to articulate any basis for its findings regarding the value of the loss to the alleged victim of the fraud, and there was no evidence in the record supporting the district court's finding of loss?

PARTIES BELOW

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, the court whose judgment is sought to be reviewed:

James Robert Winkleman
Brenton Mullins
Phillip Rinker
United States of America

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Case No. 90-50109

PETITION FOR WRIT OF CERTIORARI

Petitioner James Robert Winkleman ("Petitioner") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I.

OPINIONS BELOW

The District Court's final judgment order finding Petitioner guilty of fifteen (15) counts of 18 U.S.C. §§ 371, 1341, 1342 and 1343 (conspiracy, mail and wire fraud and use of fictitious name or address) is reproduced herein at Appendix C. The Ninth Circuit Court of Appeals judgment and memorandum opinion

affirming conviction but vacating the sentence is attached hereto as Appendix B.

II.

JURISDICTION

The judgment sought to be reviewed by writ of certiorari was dated and entered January 8, 1993. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1) (1988). The U.S. Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294(1), and 18 U.S.C. § 3742. The United States District Court for the Central District of California had jurisdiction pursuant to 18 U.S.C. § 3231.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, the text of which is contained in Appendix A:

Amendment V of the United States Constitution.

Amendment VI of the United States Constitution.

This case also involves the following statutory provisions, the text of which is contained in Appendix A:

18 U.S.C. § 1341 (1991).

18 U.S.C. § 1343 (1991).

Federal Rule of Criminal Procedure 32, Fed. R. Crim. P. 32 (1991) and (Rule Applicable to Offenses Committed Prior to Nov. 1, 1987).

U.S. Sentencing Guidelines § 2F1.1 — *Fraud and Deceit*, U.S.S.G. § 2F1.1 (1991).

U.S. Sentencing Guidelines § 6A1.3 — *Resolution of Disputed Factors* (Policy statement), U.S.S.G. § 6A1.3, and Commentary (1991).

IV.

STATEMENT OF THE CASE

A. THE OFFENSES CHARGED

Under the 22 count first superseding indictment, filed July 6, 1990, James Robert Winkleman, a travel agent, was charged with conspiracy, use of fictitious names or addresses and wire and mail fraud in violation of Title 18 of the U.S. Code, based upon his alleged involvement in a conspiracy to use the American Airlines ("American") computerized reservations system known as SABRE to transfer mileage flown by fare-paying passengers fraudulently into American's frequent flyer "AAdvantage" program accounts that Mr. Winkleman set up and controlled. [C.R. 34, 3-5.][1] Mr. Winkleman allegedly used the transferred miles to accumulate sufficient mileage in those accounts to enable him to redeem award certificates for the mileage from the AAdvantage program. Those award certificates could, in turn, be used to obtain free airline tickets, travel class upgrades and hotel and car rental discounts. The government alleged that Mr. Winkleman would either sell or exchange the award certificates, or redeem them for airline tickets or upgrade coupons. [C.R. 34, 5.]

B. ELEMENTS OF THE OFFENSES CHARGED

As the court instructed the jury in this case, Mr. Winkleman was charged with mail and wire fraud, which were the predicate offenses for the conspiracy and use of fictitious names and addresses charges. [R.T.T. 1013.] To show that Mr. Winkleman was guilty of those offenses, the government had to prove beyond

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[1] "C.R." refers to the District Court Clerk's Record; "E.R." refers to the Excerpt of Clerk's Record, filed with the Ninth Circuit Court of Appeals on February 12, 1992. There are several reporter's transcripts which cover pretrial hearings, the trial and post-trial motions and sentencing. The various transcripts for pretrial motions are referred to as: "R.T.M. 8/21/90"; "R.T.M. 8/24/90"; "R.T.M. 9/13/90"; and "R.T.M. 9/26/90." The seven volumes of trial transcripts are referred to as "R.T.T." The post-trial motions and sentencing transcript which is dated February 5, 1991 is referred to as "R.T.S."

a reasonable doubt: (1) that he wilfully devised or wilfully participated in a scheme to obtain money or property by knowing use of false statements or representations; (2) that he used the mail and interstate wire communications as an important part of the scheme; and (3) that he acted with intent to defraud property from the party who was the object of the scheme. [R.T.T. 1014-1018.]

At the close of evidence, the government had offered evidence that someone using Mr. Winkleman's "sine code"[2] had made changes to American's Passenger Name Records in the SABRE computer reservation system either to transfer mileage generated by travelling passengers into other individual's AAdvantage accounts, or to add the number of an AAdvantage account under the travelling passenger's name so that the mileage would be credited to those accounts.[3] The government alleged that Mr. Winkleman had requested that American establish these AAdvantage program accounts in real and fictitious names, and offered evidence that Mr. Winkleman had opened up post office boxes at various mail receiving services to receive the AAdvantage program statements and award certificates from these accounts. [R.T.T. 378-381.] The key evidence was the allegedly fraudulent transfer of mileage, as all the other evidence could just as easily been interpreted as part of a coupon-brokering business.[4]

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[2]The "sine code" is a three to four digit number or combination of letters assigned to an individual that is entered into the SABRE computer whenever the individual accesses a SABRE computer terminal. [R.T.T. 116.]

[3][R.T.T. 120, 126, 145-146, 157.]

[4]Mr. Gilman, a government witness, defined coupon brokering as receiving mileage credits for flights, accumulating a specific amount of mileage credits, and redeeming those credits for free travel, discounted travel or upgrades in the class of service flown. Coupon brokers "pool miles" by having other individuals fly on airplane tickets and transfer the mileage thus generated to accounts controlled by the broker. [R.T.T. 425, 429, 475-76.] The brokering consists of "taking those miles and giving them or selling them to another party." [R.T.T. 424-25.] Brokering frequent flyer awards is an openly advertised practice which may or

The judge instructed the jury that "coupon-brokering is not in and of itself illegal." [R.T.T. 1018.]

On October 10, 1990, the jury found Mr. Winkleman guilty of one count of conspiracy to commit mail and wire fraud and fourteen substantive counts of wire and mail fraud and use of fictitious names.[5] In all likelihood, the jury found Mr. Winkleman guilty because the district court prohibited Mr. Winkleman from presenting evidence controverting elements of the crimes charged. [E.R. 20-25; R.T.M. 9/26/90, 7, 10-11, 27-29.]

C. THE EXCLUDED DEFENSE

On September 26, 1990, on the motion of the government, the United States District Court for the Central District of California conditionally ruled that the Petitioner, Mr. Winkleman, and his co-defendants were prohibited from presenting any evidence[6] which would have been offered to show that: (1) the miles were not property within the meaning of the mail and wire fraud statutes, and (2) the miles, if they were property at all, belonged to the passengers who bought the tickets and flew the miles, but who abandoned the miles by not claiming them.[7] The court

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may not violate the rules of the individual frequent flyer programs. [R.T.T. 425.] Mr. Gilman also testified that it was common for travel agents to manage frequent flyer accounts for their customers. [R.T.T. 428.]

[5]Mr. Winkleman was convicted of eight substantive counts of wire fraud, five substantive counts of mail fraud, and one count of use of fictitious names and addresses in furtherance of the mail and wire fraud schemes. [C.R. 85; R.T.T. 1173-74.] The jury acquitted Mr. Winkleman of 6 counts of wire fraud. The court had dismissed one substantive count (Count 15) during the jury deliberations. [C.R. 85; R.T.T. 1166, 1173-74.]

[6]The prohibition included proffered expert witness testimony, as well as testimony by the defendants and testimony and documents provided by American Airlines.

[7]The debate over the relevance of the value of the mileage had been ongoing since Mr. Winkleman's pretrial attempt to obtain information

ordered the defendants not to raise these issues at trial. [E.R. 20-25; R.T.M. 9/26/90, 7, 10-11, 27-29.]

Had the Court not erroneously excluded this evidence, defendants would have offered it to make two points crucial to Mr. Winkleman's defense. First, the evidence would have provided Mr. Winkleman with an absolute defense to the crime charged, since it would have negated two essential elements of the government's prima facie case, *i.e.*, that Mr. Winkleman had taken something of value, and that the property interest had been taken from American, the alleged victim. Second, with evidence of the lack of value and ownership of the frequent flyer miles, Mr. Winkleman could have cast doubt on the intent element of the crimes charged, with objective evidence to argue that the government failed to prove Mr. Winkleman's intent to defraud American, and support for an argument that Mr. Winkleman had a good faith belief that his actions, even if in violation of the airline's frequent flyer rules, were not criminal in nature.

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from American regarding its treatment of the frequent flyer mileage for internal and external accounting purposes, including its publicly filed reports on assets and liabilities, filed with the Securities and Exchange Commission ("S.E.C."). [C.R. 53.] Winkleman proffered to the court that an expert was prepared to testify that for accounting purposes, American treats AAdvantage miles as a liability, not an asset, that below a certain level of mileage, American does not treat the miles as creating any liability against American's assets, and that all the counts charged contained less than that level of mileage. Therefore, the discovery sought would have shown that the indictment failed to charge Mr. Winkleman with the taking of anything of value. [C.R. 54; E.R. 17; R.T.M. 8/21/90, 10, 12, 18; R.T.M. 8/24/90, 10-11.] Winkleman also proffered that a lack of value for accounting purposes showed that American itself believed that the miles were the property of the passengers who flew the trip; that the passengers had abandoned the mileage by not claiming it, and as a result there was no defrauding of anyone. [E.R. 20; R.T.M. 8/21/90, 20.] The court ordered only that American provide information regarding the levels of mileage at which no value is ascribed by American. [C.R. 59; R.T.M. 8/24/90, 17.] American agreed to voluntarily provide the value it ascribed per AAdvantage mile for the time period relevant to the litigation. [R.T.M. 8/24/90, 6.]

The government offered no testimony from any of the passengers who actually bought, paid for and flew on the flights that generated the mileage which the government alleged Mr. Winkleman had taken, nor was there any evidence that the mileage-generating passengers had failed to consent to the transfer of their miles to AAdvantage accounts controlled by Mr. Winkleman. There was, however, testimony offered in the government's case by Russell Gilman, a former United Airlines Mileage Plus frequent flyer program administrator and a former employee of one of Mr. Winkleman's travel agencies. Mr. Gilman testified that he believed Mr. Winkleman was simply engaged in "coupon brokering". [R.T.T. 369, 372, 424.] Mr. Gilman did not view coupon brokering as wrong or illegal even when it involved signing other people's names to the travel award coupons. [R.T.T. 425, 439.] Mr. Gilman also testified that, while he was working for United Airlines, he regularly dealt with 25 to 30 travel agencies who managed their customers' frequent flyer accounts. [R.T.T. 428.]

Nevertheless, upon the close of the government's case, the district court again refused to allow the defendants to offer documentary evidence and testimony on the lack of value and ownership of the mileage on the grounds that such evidence was immaterial and therefore inadmissible.[8] [E.R. 23, R.T.T. 658.] This evidence was excluded despite that the only thing that the indictment charged Mr. Winkleman with fraudulently taking was "mileage." [C.R. 34, 4, ¶ 4.] Furthermore, this evidence was excluded notwithstanding the fact that "the heart" of Mr. Winkleman's defense was that he might have violated the American AAdvantage frequent flyer program rules, but he had

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[8]The Court ruled:

> Okay. Without any help from the government, I'll have to say, without any help from the government, I still believe that it's immaterial. The tickets, in my opinion, do have value. The fact that the scheme was to get the tickets, as I have said before, is what constitutes the scheme to defraud, then to obtain money and property, the property being those tickets.

[E.R. 23; R.T.T. 658.]

not committed a federal crime, nor did he have the intent required to do so.

D. THE SENTENCING

The presentence report ("PSR") recommended a guideline range sentence for Mr. Winkleman of 27-33 months. This sentence was calculated using a criminal history category of II and a total offense level of 17, based on a base offense level of 6, a loss table enhancement of +9 (based on a loss of $1.3 million), and a "more than minimal planning" enhancement of +2.[9] According to the applicable guideline, U.S.S.G. § 2F1.1, all the counts were to be "grouped" because the offense level was to be determined largely on the basis of the total amount of loss. [PSR 8, 10, 11-13.]

The probation officer's "loss" calculation was based on the assertion by American that the defendants controlled 850 fraudulent AAdvantage accounts, with accrued mileage of 61,852,452 miles. American's records reflected a total of 546 tickets obtained from those 850 accounts, to which the airline ascribed a fair market value of $1,308,894.27. [PSR 7-9.]

Mr. Winkleman filed a declaration by one of his attorneys, Phillip D. Israels, which stated that a post-trial review of the 850 AAdvantage accounts showed that only 428 accounts were controlled by defendants. [C.R. 112.] The review was conducted using the criteria that the accounts were either identified in the indictment as being controlled by the defendant, used mail receiving services shown to have been controlled by the defendants, or were identified in the American-provided computer printout of AAdvantage account information as receiving mileage credits from changes to Passenger Name Records originating from North Ranch Travel, Mr. Winkleman's travel agency, *i.e.*, the same criteria ostensibly used by American to compile the information. [R.T.T. 240-241.] According to Mr. Israels' decla-

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[9]The applicable guidelines were those in effect November 1, 1987; the last act alleged was January 17, 1988. However, Petitioner did not have access to those Guidelines, therefore, the current Guidelines are included in Appendix A.

ration, 28 of the accounts had no mileage, 233 had accrued mileage with no withdrawals and 167 had mileage with at least one redemption. [C.R. 112, 6; R.T.S. 6.] There was no proof offered at sentencing as to why any of the questioned accounts were controlled by Mr. Winkleman.

Mr. Winkleman also filed a declaration by John Boettcher,[10] an American Airlines Financial Analysis Manager, setting forth the value per mile ascribed by American to the frequent flyer mileage carried as a liability on American's books (Boettcher Declaration, 12), and a declaration by William Murphy, one of the experts whose testimony was excluded from the trial, regarding the proper valuation of the loss sustained by American as alleged in the indictment.[11] [Murphy Declaration, 6-7.] Murphy's declaration stated that the valuation of "probable loss" required by the applicable guidelines would be the value ascribed by American to future claims against its assets for the mileage in its filings with the S.E.C., not the "alleged" fair market value of tickets suggested by American. [Murphy Declaration, 8.] Murphy concluded that, based on the information American had produced, the loss sustained by American, if anything, would be de minimis, setting forth that figure in his sealed declaration. [Murphy Declaration, 10.]

The government adopted the probation officer's suggested +9 levels for value and +2 levels for more than minimal planning, and argued for +4 levels based on Mr. Winkleman's role and +2 levels for violation of a court order. [R.T.S. 42.] Mr. Winkleman objected to the loss calculation in the presentence report and the increase for aggravating role requested by the government. [R.T.S. 47, 87.]

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[10]This declaration was produced in response to the court's discovery order directing American to produce the information regarding American's treatment of AAdvantage miles previously discussed. See *supra*, pp. 5-6, n.7. The declaration was filed under seal in both the lower courts because of a protective order agreed to between defense counsel and American Airlines.

[11]Mr. Murphy's declaration was also filed under seal because it contained information covered by the protective order.

Mr. Winkleman argued that the tickets redeemed from frequent flyer mileage had no fair market value; that their stated face value was $0; that, unlike purchased airline tickets, they could not be exchanged, refunded or transferred; that American's own documents stated that frequent flyer tickets' usage was restricted in such a way that the user would not replace a fare-paying passenger but would occupy an otherwise empty seat; that many of the awards redeemed from the accounts involved were for upgrade coupons for revenue-paying passengers, not tickets, representing not even marginal cost to American; and that there was simply no evidence offered that there was any fair market value for these tickets. [R.T.S. 51-53, 57.]

Therefore, Mr. Winkleman argued, the highest measure of damages was the cost American Airlines ascribed to the mileage taken in its publicly filed documents with the S.E.C., which, for the 61,852,452 miles suggested by American, amounted to $13,113. [R.T.S. 53.] This amount would have given a total offense level of 11, with a base level of 6, +2 for more than minimal planning and +3 for loss. Mr. Winkleman argued that none of the mileage in any of the counts charged would have passed the threshold at which American books any liability, and that, thus, the value of the loss charged in the indictment was $0, resulting in a total offense level of 8. [R.T.S. 57.] Alternatively, Mr. Winkleman asserted that since the post-trial review had shown the defendants to have controlled approximately one half of the accounts asserted by American, he should be given a total offense level of 10 (+2 for loss). [R.T.S. 58.]

After much argument by all counsel, the court asked what the sentencing range for Mr. Winkleman would be if the loss level suggested by the presentence report were reduced by 1 level (from a +9 to a +8), and was advised by the prosecutor that it would be 41-51 months.[12] [R.T.S. 93-94.] The court then found Mr. Winkleman to be the most culpable, imposing a 4 level

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[12]This calculation was a mistake based on a loss level of +8 levels. It should have been a total level of 20: a base offense level of 6, +8 for the loss level per the court, +2 for more than minimal planning, +4 for role. A level 20 in a criminal history II category results in a range of 37-46

increase for aggravating role. [R.T.S. 95.] The court rejected the request for a 2 level increase for violation of court orders as inappropriate. [R.T.S. 95.] The court then found the appropriate valuation of the amount of loss to be "from $500,000 to one million dollars, calculating the loss to the airlines and also the value to the defendants."[13] [R.T.S. 95-96.] The court imposed a sentence on Mr. Winkleman of 48 months, a fine of $250,000 and a supervised release of 3 years, imposing concurrent sentences for all the counts. [R.T.S. 96, 98-99.]

E. THE APPEAL

On appeal to the Ninth Circuit, Mr. Winkleman argued, among other things, that the lower court's exclusion of evidence regarding the value and ownership of the mileage allegedly taken was prejudicial error since the exclusion of such evidence substantially affected Mr. Winkleman's fundamental right to present a defense in his favor. [Appeal Brief, pp. 22-30.]

Mr. Winkleman argued that under the Supreme Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987), the government had to establish that Mr. Winkleman had the intent to defraud the alleged victim of a property interest. [Appeal Brief, pp. 22-25.] Mr. Winkleman argued that the proffered evidence showed that the mileage, the alleged property, was not property at all. He analogized the interest at issue to a "license." The Ninth Circuit and other circuits have held that licenses, while "property" of the recipient once issued, are not property of the issuing authority either before or after they are issued. Under this authority, licenses are not property to the issuing authority within the meaning of the mail and wire fraud statutes when that authority is the alleged victim. [Appeal Brief, p. 25.] Thus, the excluded evidence would have shown that the frequent flyer miles

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months. The prosecutor evidently was still looking at level 21. [R.T.S. 94.]

[13]There was no evidence that Mr. Winkleman or any of his codefendants received any financial benefit for the tickets allegedly involved in this case. [E.R. 27; R.T.T. 656; R.T.S. 51-52.]

and resulting tickets were not the property of American Airlines, but rather the consensually given or abandoned property of the revenue paying passenger who flew the miles. By excluding the evidence, the court denied Mr. Winkleman his right to present a defense and negate essential elements of the crimes charged.[14]

Finally, Mr. Winkleman argued that the district court's exclusion of the evidence effectively denied him his right to testify regarding his good faith belief that he had committed no fraud, thereby preventing him from negating the specific intent the government had to establish as an element of the crimes charged, in violation of the Supreme Court's holding in *Cheek v. United States*, 111 S. Ct. 604 (1991). [Appeal Brief, p. 29.] Under *Cheek*, Mr. Winkleman argued that he was entitled to present evidence of his belief that the frequent flyer miles were not the property of American Airlines, but rather the abandoned property of the fare-paying passengers. By denying him the right to present the evidence which served as the factual predicate for his belief, the district court effectively denied him his right to argue or testify regarding his good faith and the government's failure to prove intent to the jury. [Appeal Brief, pp. 29-30.]

Regarding his sentence, Mr. Winkleman argued on appeal, *inter alia*, that the district court failed to make adequate factual findings to support the determination of loss involved, appearing to be goal-oriented and looking for a loss level that would give the court the sentencing range it wanted. Thus, the court provided no record for a reviewing court, simply drawing a factual conclusion.

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[14]In its Opening Brief on appeal to the Ninth Circuit in this case, Petitioner did not expressly state that the government also was required to show that the scheme to defraud be directed at property of the *alleged victim*. However, that argument was implicitly included, in that Mr. Winkleman always asserted that the excluded evidence would have shown that the mileage belonged not to American, but to the travelling passengers about whom there was a complete lack of evidence by the government. [Appeal Brief, p. 28.]

Moreover, this Court has discretion to decide the issue, even if it was not properly raised on appeal to the Ninth Circuit. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

Mr. Winkleman further argued that the court had no factual basis for the loss imposed, picking a figure neither argued nor suggested by anyone and for which there was no factual support in the record. [Appeal Brief, pp. 38-39.]

On January 8, 1993, despite Petitioner's argument, the U.S. Court of Appeals for the Ninth Circuit affirmed Mr. Winkleman's conviction by the U.S. District Court for the Central District of California and affirmed the loss valuation imposed by that court in determining the sentence.[15] (Appendix B, p. 10.) In a cursory discussion, the Ninth Circuit held that the object of the scheme was "airline tickets," which could be construed as property. (Appendix B, p. 3.) The court of appeals dismissed the *Cheek* argument in a footnote, stating that the proffered evidence had nothing to do with Mr. Winkleman's intent. (Appendix B, p. 3 n.2.)

The court of appeals also rejected Mr. Winkleman's arguments regarding the errors in the district court's valuation of loss, submitting two hypotheses as to the district court's reasoning, both unsupported by the record: (1) that the loss value imposed was the "fair market value" of the tickets, and (2) that the district court accepted the presentence report value and then "discounted that figure . . . to reflect that the appellants did not profit from every ticket obtained." (Appendix B, pp. 7-8.) The court of appeals made no comment regarding the district court's failure to make findings in response to Mr. Winkleman's objections and controverting evidence.

The Ninth Circuit erroneously interpreted Supreme Court authority in reaching its decision, in disregard of the constitutional right of an accused to present relevant, material evidence in its defense, and upheld a sentence violative of the due process clause of the Fifth Amendment.

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[15]The court of appeals vacated the sentence, because the 48-month term imposed was 2 months longer than the maximum term allowed for the offense level of 20, category II determined by the district court. (Appendix B, pp. 8-9.)

V.

REASONS FOR GRANTING CERTIORARI

The Constitution guarantees certain fundamental rights for every defendant facing a criminal prosecution. Paramount among those is the right of a defendant not to be tried, convicted and sentenced to a term of imprisonment "without due process of law."[16] Due process is exactly what this Petitioner did not receive, both during trial and at sentencing. The record below shows that the district court and court of appeals misinterpreted this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and *Cheek v. United States*, 111 S.Ct. 604 (1991), in excluding, and affirming the exclusion of, relevant evidence crucial to Mr. Winkleman's defense, thus depriving Mr. Winkleman of his fundamental right to present a defense. Due to the government's request for publication, the decisions of the courts below are likely to limit the fundamental rights of future defendants, by providing a precedent for the wrongful exclusion of evidence. (See Appendix D, Request for Publication.)

The courts below upheld the exclusion of evidence on the ground that, as a matter of law, the government had satisfied its burden of showing the taking of property from the alleged victim, thus treating a complex legal and factual inquiry as a purely legal matter, and removing factual questions regarding essential elements of the crimes charged from the jury's consideration.[17] The courts implicitly adopted a "constructive trust/economic benefit" theory, *i.e.*, that something which conferred a benefit on the

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[16]*See Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-741 (1948).

[17]*United States v. McClain*, 545 F.2d 988, 1004 (5th Cir. 1977) (defendant has absolute right to a jury determination upon all essential elements of the offense); *accord United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972); *United States v. Fueston*, 426 F.2d 785 (9th Cir. 1970); *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969); *United States v. England*, 347 F.2d 425 (7th Cir. 1965); *United States v. Manuszak*, 234 F.2d 421 (3d Cir. 1956).

recipient had to be "property" within the hands of the issuing entity. This ruling is at odds with this Court's decision in *McNally*, and the law in a majority of the Circuits who have addressed the issue.[18]

Furthermore, the sentence imposed on Mr. Winkleman was based on incorrect information which Mr. Winkleman challenged in both his written objections to the presentence report and orally at the sentencing hearing, and the accuracy of which had been impugned at trial.[19] Nevertheless, the court of appeals upheld the district court's imposition of a sentence based upon this erroneous information, without making any specific findings in response to Mr. Winkleman's objections or stating an adequate rationale, orally or in writing as required under the Federal Rules of Criminal Procedure. Fed.R.Crim.P. 32(c)(3)(D). Moreover, the sentence imposed was not based on any evidence presented in the case, and in violation of Mr. Winkleman's due process rights.[20]

A. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S EXCLUSION OF EVIDENCE THAT SHOULD PROPERLY HAVE GONE TO THE JURY IMPINGES ON THE FUNDAMENTAL RIGHT TO PRESENT A DEFENSE.

Because the Ninth Circuit's decision, upholding the exclusion of evidence on the grounds that it was "not material," when that evidence was tendered as proof that (1) the interest alleged to be

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[18]*See United States v. Schwartz*, 924 F.2d 410, 418 (2d Cir. 1991); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), *cert. denied* 111 S.Ct. 2024 (1991); *United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir.), *cert. denied* 488 U.S. 924 (1988); *contra United States v. Martinez*, 905 F.2d 709, 713-15 (3d Cir.), *cert. denied* 498 U.S. 1017 (1990).

[19][C.R. 102, 103, 112; R.T.S. 6-7, 52-59; R.T.T. 232-236, 261-263, 266-270, 273-275, 291-293, 297.]

[20]*See Roberts v. United States*, 445 U.S. 552, 556 (1980); *United States v. Tucker*, 404 U.S. at 447; *Townsend v. Burke*, 334 U.S. at 740-741.

"property" was not property, (2) the interest did not belong to the alleged victim, and (3) the defendant did not have the intent to defraud, could render and has rendered inadmissible significant exculpatory evidence in violation of an accused's fundamental right to present a defense. At issue, then, is an important question of federal law which both conflicts with policies articulated by this Court and which has not been, but should be decided by this Court. *See* Rule 10(c) of the Rules of the Supreme Court of the United States.

1. **An Accused Is Entitled To Offer Evidence To The Jury Negating The Property Element Of A Mail And Wire Fraud Prosecution So That The Court's Exclusion Of That Evidence Was A Violation Of An Accused's Fundamental Right To Present A Defense.**

If courts are allowed to decide mixed factual and legal questions regarding whether the government has met its burden on essential elements of mail and wire fraud prosecutions, an accused will be prevented from offering competent, credible and relevant exculpatory evidence. This creates a perilous situation wherein the fundamental right to present a defense is in jeopardy.

Whether derived from the Fifth Amendment, or the Sixth Amendment of the United States Constitution, this Court has established that there is a constitutional right for an accused to present a defense: "[t]he right of an accused in a criminal trial is in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. at 294. As this Court in *Crane v. Kentucky*, 476 U.S. 683, eloquently stated:

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one, if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence. In the absence of any valid State justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case

> encounter and survive the crucible of meaningful adversarial testing.

Id. 476 U.S. at 690-91 (citations omitted).[21] This fundamental right means that a defendant has a right to present relevant material exculpatory evidence in his favor. *Crane v. Kentucky*, 476 U.S. at 690. Moreover, the Sixth Amendment right to trial by jury guarantees that "the defendant has an absolute right to a jury determination upon all essential elements of the offense."[22]

Here, Mr. Winkleman offered evidence in the form of expert and other testimony, and documents provided by American Airlines, showing that the frequent flyer miles alleged to have been taken by fraud were not property. The evidence was excluded as being "immaterial." [E.R. 23; R.T.T. 658.] This Court has held evidence is "material" if it has a tendency to negate a finding of guilt, *i.e.*, "the suppressed evidence might have affected the outcome of the trial."[23] It is hard to conceive of evidence that more clearly fits this definition than that excluded in the present case. Moreover, the decision to exclude the evidence negating essential elements of the offense was reached without Mr. Winkleman ever having the chance to present his evidence to the court, despite several proffers. [R.T.M. 8/24/90, 16; R.T.T. 171.]

The Ninth Circuit upheld the exclusion of the evidence, agreeing with the lower court that the "tickets could be property. . . ." (Appendix B, p. 3.) However, the question was not whether airline tickets *could* be property in some instances, nor whether the property element had been satisfied in this instance. The

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[21] *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 872 (1982) (standard of fundamental fairness requires criminal defendant to be offered a meaningful opportunity to present a complete defense).

[22] *United States v. McClain*, 545 F.2d at 1004 (5th Cir.); *accord United States v. O'Dell*, 462 F.2d 224 (6th Cir.); *United States v. Fueston*, 426 F.2d 785 (9th Cir.); *United States v. Hayward*, 420 F.2d 142 (D.C. Cir.); *United States v. England*, 347 F.2d 425 (7th Cir.); *United States v. Manuszak*, 234 F.2d 421 (3d Cir.).

[23] *United States v. Valenzuela-Bernal*, 458 U.S. at 868 (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976).)

question was whether Mr. Winkelman was entitled to present evidence to the jury negating that element of the crime charged. *See McNally v. United States*, 483 U.S. at 358-61 (the mail fraud statute only punishes those who fraudulently deprive others of their property). Moreover, the one thing that is certain from the *Transworld Airlines, Inc. v. American Coupon Exchange, Inc.* ("TWA") decision cited by the court of appeals in support of its holding is that even the issue answered by the court of appeals, *i.e.*, whether frequent flyer tickets are property, is not as clear cut as the court of appeals portrayed it. *See TWA*, 913 F.2d 676 (9th Cir. 1990). *TWA* involved the appeal by American Coupon Exchange, brokers of airline frequent flyer coupons, from a permanent injunction prohibiting them from brokering TWA frequent flyer coupons, and from the grant of summary judgment in favor of TWA on several other matters related to the transferability of frequent flyer coupons. *Id.* at 678. In answering the question whether the frequent flyer coupons redeemed for accumulated mileage credits were "property" to which the public policy against restrictions on alienability applied, the court went through a lengthy analysis, ultimately concluding that the frequent flyer award coupons were not property but contract rights:

> [T]the award coupons at issue here are actually one step removed from the ticket cases considered above, since a frequent flyer award coupon is not even a *ticket*; it is merely the right to receive a ticket upon redemption of the coupon. We believe that further mitigates against classifying these awards as "property rights." It would be anomalous indeed if a coupon earned by performance of a contract and redeemable for another contract became "property" simply by being reduced to a cardboard voucher during its brief period of limbo.

Id. at 688; *see* lengthy discussion, *id.* at 685-89.

The two decisions that the court of appeals cited as further support, *United States v. Loney*, 959 F.2d 1332 (5th Cir. 1992), and *United States v. Schreier*, 908 F.2d 645 (10th Cir. 1990), *cert. denied* 111 S.Ct. 787 (1991), are not only distinguishable, but also do not answer the question whether Mr. Winkleman should have been able to place the evidence before the jury to try the

prosecutor's case in "the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. at 690-91. In *United States v. Loney*, the Fifth Circuit Court of Appeals upheld a wire fraud conviction based on the creation of bogus mileage by an American Airlines customer service representative who then transferred the miles into AAdvantage frequent flyer accounts controlled by her coconspirator. 959 F.2d at 1336. In the present case, the mileage allegedly transferred by Mr. Winkleman was generated by fare-paying passengers, who earned the mileage in return for their patronage of American. In *United States v. Schreier*, the Tenth Circuit upheld a wire fraud conviction based on a fact pattern similar to the present case, but in that case, the defendants never obtained any discovery from American on the value issue and never even *attempted* to offer evidence on the issue at trial. As has been stated hereinabove, Mr. Winkleman obtained discovery on this issue from American and tried repeatedly to introduce it at trial. Thus, the courts below excluded, and affirmed the exclusion of, evidence rejecting an essential element of the crimes charged in violation of Mr. Winkleman's due process rights. *See Crane v. Kentucky*, 476 U.S. at 690; *United States v. Valenzuela-Bernal*, 458 U.S. at 868.

2. The Government Is Required To Prove Intent To Defraud A Particular Victim Under The Mail And Wire Fraud Statutes, So That The Court's Erroneous Decision To Exclude Evidence Was A Violation Of An Accused's Fundamental Right To Present A Defense.

Based on this Court's holding in *McNally*, many of the circuits have held that one of the essential elements in a mail and wire fraud prosecution is that the scheme to defraud be directed at the property of the alleged victim, *i.e.*, there must be congruence between the party deceived and the party injured.[24] Thus, lower courts have dismissed mail and wire fraud prosecutions where the

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[24]*See United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989); *United States v. Shelton*, 848 F.2d 1485, 1495 (10th Cir. 1988); *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988).

evidence presented did not show that the party deceived was the party injured.[25]

In the present case, Mr. Winkleman offered evidence showing that the frequent flyer mileage alleged to have been taken by fraud was not American's property but rather the property of the fare-paying passengers who generated the mileage. The government did not show that the transfer of these passengers' mileage was not authorized *nor* that the passengers had not abandoned the mileage later credited to AAdvantage accounts managed by Mr. Winkleman. The government had a complete failure of proof with respect to the mileage-generating passengers.

Although the government failed to allege a victim in the indictment (*see* C.R. 34; R.T.M. 8/21/90, 42), the government tried the case with American clearly portrayed as the injured party. The excluded evidence would have shown that the government had failed to prove an essential element of its case.[26] Therefore, the court's exclusion of the evidence relating to the ownership of the mileage kept material evidence from going to the jury, in violation of Mr. Winkleman's due process rights. See *Crane v. Kentucky*, 476 U.S. at 690; *United States v. Valenzuela-Bernal*, 458 U.S. at 868. The lower courts' decisions in this case are in conflict with the due process concerns that a defendant only be convicted on the basis of conduct which is a federal crime, and

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[25]*See Corcoran v. American Plan Corp.*, 886 F.2d 16, 20 (2d Cir. 1989) (mail fraud prosecution dismissed where complaint alleged that New York State Insurance Superintendent was party deceived, but two insurance companies were harmed), *United States v. Lew*, 875 F.2d at 221-22 (attorney's mail fraud conviction could not be based on theory that misrepresentations were made to Government, while money was obtained from attorney's clients).

[26]The district court instructed the jury:

> In order to prove the mail and wire fraud offenses charged in the indictment, the government must prove that the defendant's intent was to defraud or obtain money or property from the party who was the object of the scheme to defraud.

[R.T.T. 1018.]

that he is entitled to have jury determination on all essential elements of that crime.

3. This Court's Decision In *Cheek* Requires That A Defendant Be Entitled to Present Evidence Supporting His Belief In The Lawfulness Of His Conduct Such That The Court's Exclusion Of The Evidence Denied The Defendant His Fundamental Right To Present A Defense.

The government must prove specific intent to defraud as one of the essential elements of a mail and wire fraud prosecution.[27] In order to meet this burden, the government must show that the defendant acted "willfully," *i.e.*, that he acted intentionally and voluntarily with the specific intent to do something which the law forbids. *See, United States v. Bailey*, 859 F.2d 1265, 1273 (7th Cir. 1988), *cert. denied* 498 U.S. 1010 (1989). Therefore, good faith is a complete defense to a mail fraud charge.[28]

In *Cheek*, this Court held that the district court had erred in instructing the jury that the defendant's honest but objectively unreasonable belief, that he was not violating the tax laws because his wages were not "income" within the meaning of the tax code, did not negate the specific intent of "willfulness" that the government was required to prove. 111 S.Ct. at 611.

In the present case, Mr. Winkleman was prevented from presenting his good faith defense to the jury either in argument or by testifying himself, by the court's exclusion of all evidence on the value and ownership of the frequent flyer mileage. Without the excluded evidence, Mr. Winkleman could not credibly argue or testify that he did not intend to defraud anyone.

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[27] *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986); *United States v. Rodolitz*, 786 F.2d 77, 80 (2d Cir.), *cert. denied* 479 U.S. 826 (1986); *United States v. Silva*, 781 F.2d 106, 108 (7th Cir. 1986).

[28] *See United States v. Cheek*, 111 S.Ct. at 610-611 (good faith belief that conduct at issue is legal negates "willfulness"); *United States v. Alexander*, 849 F.2d 1293, 1301 (10th Cir. 1988) (good faith is a complete defense to mail fraud).

The court did not expressly prevent Mr. Winkleman from testifying as to his good faith, but effectively did so by preventing him from explaining *why* he believed his conduct was lawful. Moreover, unlike the "unreasonable" belief that wages are not income that this Court held should have gone to the jury in *Cheek*, 111 S.Ct. at 611, Mr. Winkleman's proffered evidence combined with the government's failure to call the mileage-generating passengers to indicate that they refused or failed to give consent to the pooling of their miles provided a very reasonable, credible defense to argue to the jury. As this Court stated in *Cheek*, "knowledge and belief are characteristically questions for the fact finder." *Id.* In the present case as in *Cheek*, the lower court took a question of fact away from the factfinder in violation of a defendant's Sixth Amendment due process rights. *Id.*

B. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER DUE PROCESS REQUIRES A SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES TO HAVE AN ARTICULATED RATIONAL BASIS, BASED ON ACCURATE EVIDENCE.

The Sentencing Reform Act of 1984, and the Guidelines promulgated as a result of that Act, "revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 111 S.Ct. 2182, 2184 (1991). The purpose of the reform was to rationalize and instill uniformity in sentencing throughout the federal court system. *See*, S. Rep. No. 98-225, pp. 38, 49 (1983); *see also Burns v. United States*, 111 S.Ct. at 2184. At the same time, Congress also enacted procedural reforms in order to achieve its goal of assuring fundamental fairness and certainty in sentencing, among which were amendments to Federal Rule of Criminal Procedure 32 to provide for "focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." *Burns v. United States*, 111 S.Ct. at 2185; *see* 28 U.S.C. § 991(b)(1)(B).

The detailed sentencing procedure embodied in Rule 32 and the Guidelines was set forth by Congress in recognition of a constitutional right long recognized by this Court: the due process

right of a defendant to be sentenced based on accurate information.[29]

The court's actions in the present case clearly violated Rule 32(c)(3)(D), which requires that, if the defendant or counsel allege any factual inaccuracies in the presentence report, "the court shall, as to each matter controverted, make (i) a finding as to the allegations or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." Fed.R.Crim.P. 32(c)(3)(D). A written record of the court's findings are to be appended to the presentence report. Fed.R.Crim.P. 32(c)(3)(D). "Rule 32(c)(3)(D) serves the dual purpose of (1) protecting a defendant's due process right to be sentenced on the basis of accurate information, and (2) providing a clear record of the disposition of controverted facts in the presentence report, which, in turn, reduces the likelihood that subsequent appellate or administrative decisions will be made on improper or incomplete information."[30]

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[29]*See United States v. Tucker*, 404 U.S. at 447; *Townsend v. Burke*, 334 U.S. at 740-41; *Poor Thunder v. United States*, 810 F.2d 817, 822 (8th Cir. 1987); *Johnson v. United States*, 805 F.2d 1284, 1287-88 (5th Cir. 1986); *United States v. Brown*, 715 F.2d 387, 389 (8th Cir. 1983); *see also* U.S. Sentencing Commission Guidelines Manual § 6A1.3, Official Commentary (1991) ("more formality is unavoidable [under sentencing guidelines] if the sentencing process is to be accurate and fair. . . .").

Rule 32(c) was amended in 1987 to further emphasize the importance of accurate information in the presentence report. Thus, the current rule states:

> The report of the presentence investigation shall contain . . . *verified* information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to any individual against whom the offense was committed. . . .

Fed.R.Crim.P. 32(c)(2)(D) (1992) (emphasis added).

[30]*United States v. Bruckman*, 874 F.2d 57, 63-64 (1st Cir. 1989); *see United States v. Eschweiler*, 782 F.2d 1385, 1387-88 (7th Cir. 1986); *United States v. Petitto*, 767 F.2d 607, 611 (9th Cir. 1985).

In sum, Rule 32(c)(3)(D) was enacted to prevent exactly the harm that resulted in the present case.

This Court has never directly ruled upon the issue of whether a failure to comply with the requirements of Federal Rule of Criminal Procedure 32(c)(3)(D), resulting in the sentencing of a defendant based on controverted data, is a violation of that defendant's due process rights. However, lower courts that have addressed this issue have answered it in the affirmative.[31]

Moreover, while the issue has not yet been decided by this Court, the majority of the circuits have held that factual determinations upon which the judge bases a Guidelines sentence should be found by a preponderance of the evidence.[32] Here the court did not even make specific findings, much less make findings that meet the standard required by due process concerns.[33] In the

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[31]*See, e.g., United States v. Bruckman*, 874 F.2d at 63-64 (1st Cir.); *United States v. Peterman*, 841 F.2d 1474, 1482-84 (10th Cir. 1988), *cert. denied* 488 U.S. 1004 (1989); *Poor Thunder v. United States*, 810 F.2d at 822 (10th Cir.); *United States v. Eschweiler*, 782 F.2d at 1387-88 (7th Cir.); *United States v. Petitto*, 767 F.2d at 611 (9th Cir.); *cf.*, *United States v. Aubrey*, 878 F.2d 825, 828 (5th Cir.) *cert. denied* 493 U.S. 922 (1989).

[32]*United States v. Kwong-Wah*, 966 F.2d 682, 685-86 (D.C. Cir.), *cert. denied*, 113 S.Ct. 287 (1992); *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir.), *cert. denied*, 498 U.S. 990 (1990); *United States v. Ross*, 905 F.2d 1050, 1054 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990); *United States v. Wilson*, 900 F.2d 1350, 1354 (9th Cir. 1990); *United States v. Frederick*, 897 F.2d 490, 493 (10th Cir.), *cert. denied*, 498 U.S. 863, 111 S.Ct. 273 (1990); *United States v. McDowell*, 888 F.2d 285, 290-91 (3d Cir. 1989); *United States v. Guerra*, 888 F.2d 247, 250-51 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); *United States v. Ehret*, 885 F.2d 441, 444 (8th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *see also* Commentary, U.S.S.G. § 6A1.3 (amendment effective Nov. 1, 1991, stating "Commission believes that use of preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving factual disputes").

[33]*See Walton v. United States*, 908 F.2d 1289, 1302 (6th Cir.), *cert. denied* 498 U.S. 990 (1990) (due process requires the court to find that the defendant is more likely than not *actually* responsible for an amount

present case, the sentencing court picked a value for American's loss which was not suggested by any of the parties nor by the presentence report, and for which there was no support in the record at trial or sentencing.

Based upon information provided by American, the presentence report estimated American's losses to be approximately $1,300,000, recommending a 9-level increase to the base offense level to reflect this loss. The government also adopted American's loss valuation. Mr. Winkleman had shown the summary data provided by American to be inaccurate at trial, and had submitted specific objections to the presentence report, providing controverting evidence in the form of declarations and documentation, some provided by American itself.[34]

In keeping with the result-oriented treatment to which Mr. Winkleman had been subjected throughout the legal proceedings, the district court never specifically addressed any of Mr. Winkleman's objections with respect to the presentence report. As the court stated when Mr. Winkleman's counsel started to address the issue at sentencing:

> Let me make it clear. It's certainly part of the sentencing because of the guidelines. I'm not really sure that I find too much difference between a guy who wants to defraud somebody out of $100,000 than I do out of a million.

[R.T.T. 48-49.] Then the court, after a lengthy statement by Mr. Winkleman's counsel regarding various objections to the value ascribed to American's losses by the presentence report, pro-

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greater than or equal to the amount for which he or she is being held responsible) (citing *Townsend v. Burke*, 334 U.S. at 741); *accord United States v. Sklar*, 920 F.2d 107, 113 (1st Cir. 1990); *United States v. Lawrence*, 915 F.2d 402, 409 (8th Cir. 1990).

[34][R.T.T. 232-236, 261-263, 266-270, 273-275, 291-293, 297; C.R. 102, 103, 112; R.T.S. 6-7, 52-59.]

ceeded to inquire in what sentence range various loss values resulted. [R.T.S. 54-58, 92-95.][35]

Evidently the sentence range which resulted from a loss value one level lower than the 9 level increase suggested by the probation officer and the government was the one desired by the court, because after being informed that +8 for loss taken with the other suggested increases (+2 for more than minimal planning, +4 for role) resulted in a sentence range of 41 to 51 months for Mr. Winkleman, the judge stated that he believed the appropriate valuation would be the +8 level on the loss table, *i.e.*, "$500,000 to one million dollars." [R.T.S. 95.] The court stated that the value range considered "the loss to the airlines and also the value to the defendants."[36] [R.T.S. 95.] The court never addressed Mr. Winkleman's objections.

The Ninth Circuit Court of Appeals' findings that the loss determination represented either the "fair market value" of American's losses or the $1.3 million suggested by the government "discounted to reflect that the appellants did not profit from any ticket obtained," (Appendix B, pp. 7-8), is not only unsupported by the record, it does not cure the district court's failure to either make specific findings about Mr. Winkleman's objections or state that the controverted data would not be considered in sentencing. In the absence of written findings or evidence in the transcript that the findings were made or the inaccurate evidence not considered, Mr. Winkleman's sentencing was in violation of due process. *See United States v. Bruckman*, 874 F.2d at 63-64; *United States v. Eschweiler*, 782 F.2d at 1387-88; *United States v. Petitto*, 767 F.2d at 611.

This case presents important questions of federal law which have not been decided by this Court. Given the fundamental

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[35]In the midst of this inquiry, the court stated again: "As I say, it wouldn't make any difference to me if the value here was $2,000. What he did was the same." [R.T.S. 63.]

[36]There had never been any evidence presented at trial or sentencing regarding any financial benefit the defendants received from the conduct at issue. [E.R. 27; R.T.T. 656; R.T.S. 51-52.]

nature of due process rights involved, and the conflict which exists between the decisions of the lower courts, on the one hand, and policies articulated by this Court, on the other hand, the Court should grant certiorari. *See* Rule 10(c) of the Rules of the Supreme Court of the United States.

VI.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Dated: April 7, 1993

APPENDIX

A

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Section 1341 of Title 18 of the United States Code:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail

according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both.

4. Section 1343 of Title 18 of the United States Code:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

5. Federal Rules of Criminal Procedure, Rule 32. *Sentence and Judgment:*

(a) *Sentence.*

(1) *Imposition of Sentence.* Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also —

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the

presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) *Judgment.*

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the

interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) *Presentence Investigation.*

(1) *When Made.* A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant.

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) *Disclosure.*

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) [Revocation of Probation.] (Abrogated Apr. 30, 1979. eff. Dec. 1 1980)

Rule Applicable to Offenses Committed
Prior to Nov. 1, 1987

This rule as in effect prior to amendment by Pub.L. 98-473 read as follows:

Rule 32. *Sentence and Judgment*

(a) *Sentence.*

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) *Judgment.*

(1) *In General.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If

the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) *Presentence Investigation.*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) *Report.* The presentence report shall contain

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) *Disclosure.*

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report

thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) *Plea Withdrawal.* If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) [Revocation of Probation.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)

For applicability of sentencing provisions to offenses, see Effective Date and Savings Provisions, etc., note, section 235 of Pub.L. 98-473, as amended, set out under section 3551 of Title 18, Crimes and Criminal Procedure.

6. U.S.S.G. § 2F1.1 — *Fraud and Deceit*

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense —

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

7. U.S.S.G. § 6A1.3 — *Resolution of Disputed Factors* (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. *See United States v. Fatico*, 63 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F. Supp. 751 (D.C. Wis. 1980), *aff'd* 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

APPENDIX
B

FILED Jan. 8, 1993
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BRENTON NEIL MULLINS, *Defendant-Appellant.*	No. 91-50107 D.C. No. CR-90-0409-WMB-3
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PHILLIP ROSS RINKER, *Defendant-Appellant.*	No. 91-50108 D.C. No. CR-90-0409-WMB-2
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES ROBERT WINKLEMAN, *Defendant-Appellant.*	No. 91-50109 D.C. No. CR-90-0409-WMB-1

MEMORANDUM*

Appeals from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted October 5, 1992
San Francisco, California

Before: FARRIS, LEAVY, and TROTT, Circuit Judges.

Brenton Mullins, Phillip Rinker, and James Winkleman ("appellants") were convicted of various offenses arising out of their

*This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R 36-3.

conspiracy to defraud American Airlines ("American") by transferring frequent flyer miles to fictitious accounts and then cashing in those accounts for free airline tickets. The appellants argue, *inter alia*, that they did not commit mail and wire fraud because they did not deprive American of any property, the evidence was insufficient to support the verdicts, the court erred by substituting an alternate juror during deliberations, the government conducted an illegal wiretap, and the sentences imposed were unlawful and excessive.[1] We affirm the convictions and all but one of the sentences.

I.

Citing *Transworld Airlines, Inc. v. American Coupon Exch., Inc.*, 913 F.2d 676 (9th Cir. 1990) ("*TWA*"), the appellants argue that credit for miles flown on an airline is the property of the passenger who does the flying. From this they conclude that, since deprivation of property is an essential element of both mail fraud and wire fraud, *see* 18 U.S.C. §§ 1341, 1343, and their actions did not deprive American of any of its property, they could not have been guilty of either mail or wire fraud as against American.

The appellants' reliance on *TWA* is misplaced. We explicitly noted in that case that airline tickets could be construed as property when they are deemed to be "things of value." 913 F.2d at 688; *accord United States v. Loney*, 959 F.2d 1332, 1336 (5th Cir. 1992) (frequent flyer award coupons are airline property for purposes of the federal wire fraud statute because they are "something of value" which can be used to obtain free airline tickets; citing our holding in *TWA*). The appellants obtained this property by misusing confidential information provided by American. *Accord United States v. Schreier*, 908 F.2d 645, 647 (10th

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[1]In disposing of these consolidated appeals, we have elected to treat the major issues raised as though all three appellants had separately asserted them. Unless otherwise noted, however, we have not discussed obviously meritless contentions nor disposed of any issue not first presented to the district court. *See United States v. Belden*, 957 F.2d 671, 674-75 (9th Cir.), *cert. denied*, 61 U.S.L.W. 3262 (U.S. Oct. 5, 1992).

Cir. 1990) ("By their device of replacing nonmember passengers' names in the computer with a fictional name and account number, the [defendants] have victimized American, by fraud, and through use of computer access, wire fraud"), *cert. denied*, 111 S.Ct. 787 (1991); *cf. United States v. Bruchhausen*, No. 87-5143, slip op. 11939, 11945-46 (9th Cir. Oct. 5, 1992) (distinguishing a manufacturer's property interest in confidential information from any interest the manufacturer might have in a product's ultimate destination). Because the appellants' conduct resulted in the fraudulent deprivation of American's property, the district court did not err by excluding evidence concerning the purported "non-property" status of frequent flyer mileage.[2]

II

The appellants contend that the evidence only showed that someone at North Ranch committed the acts alleged, not that Mullins, Rinker, or Winkleman did. In support of this they point out, *inter alia*, that other North Ranch employees had access to the SABRE terminals and that neither passwords, personal identification numbers, nor sine codes were particularly secret.

The evidence concerning Winkleman's and Rinker's culpability was little short of overwhelming. While the question is somewhat closer with respect to Mullins, we conclude from this record that sufficient evidence was presented to the jury for it to have found him guilty. Accordingly, it cannot be said that no rational jury could have found beyond a reasonable doubt the essential elements of the crimes for which the appellants were convicted. *See*

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[2]Winkleman argues that he had a good faith belief in the lawfulness of his conduct, and the district court erred by not giving a more general good faith jury instruction and/or by failing to grant him a new trial pursuant to *Cheek v. United States*, 111 S.Ct. 604 (1991). We reject this contention. Winkleman's offer of evidence on the issues of value and abandonment had nothing to do with his claim that he lacked wilfulness. Moreover, his advancement of a new legal theory does not constitute newly discovered evidence warranting a new trial. Finally, the district court did in fact give a good faith jury instruction, albeit not the one Winkleman would have liked.

United States v. Bishop, 959 F.2d 820, 829 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

III

The appellants argue that Margaret Jeter's testimony at trial was false or at least misleading with respect to the size of the scheme, and that the district court's failure to make specific findings regarding the alleged lack of pretrial discovery on this issue requires a remand. Aside from the fact that the record shows that defense counsel cross-examined Jeter on this point and failed to object to the introduction of the evidence at trial, a remand would not be in order since, on the strength of this record, any wrongdoing would constitute nothing more than harmless error.[3] *See United States v. Rewald*, 889 F.2d 836, 860 (9th Cir. 1989) (absent a showing of a "reasonable likelihood that the [prosecutor's knowing use of] false evidence could have affected the jury verdict[,] . . . the government's knowing use of perjured testimony does not warrant relief"), *amended by order*, 902 F.2d 18 (9th Cir.), *cert. denied*, 111 S.Ct. 64 (1990).

IV

The appellants' contention that the district court erred by substituting an alternate juror during deliberations is also meritless. The language of Fed. R. Crim. P. 24(c) is mandatory, *i.e.*, "[T]he rule allows an alternate to be substituted for a regular juror only before the jury retires and requires that when the jury retires alternates who have not replaced regular jurors be discharged." 2 Charles A. Wright, *Federal Practice & Procedure*, § 388 at 390 (1982) ("Wright"). So long as the substitution takes place prior to deliberations, it "is within the prerogative of the trial court and does not require the consent of any party." *Id.* at 386; *accord United States v. Barrett*, 703 F.2d 1076, 1083 n.12 (9th Cir. 1983). It is only if the substitution takes place *after* jury deliberations have begun that express consent of the defendant(s)

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[3]For similar reasons we reject Mullins' arguments concerning the prosecutor's conduct during trial.

must appear on the record. *United States v. Olano*, 934 F.2d 1425, 1437 & n.21 (9th Cir. 1991), *cert. granted*, 112 S.Ct. 1935 (1992); *see also* Wright, § 388 at 89 (Supp. 1992).

The record shows that the regular juror in question had been involved in a serious automobile accident and was unable to come to court, the jury had neither begun its deliberations nor been instructed by the court, and the alternates had not yet been discharged. Accordingly, the district court did not abuse its discretion in ordering the substitution of the alternate juror. *See United States v. Echavarria-Olarte*, 904 F.2d 1391, 1395 (9th Cir. 1990).

V

The appellants' argument that they were entitled to judgments of acquittal because Jeter's monitoring of their SABRE communications violated their Fourth Amendment rights finds no support in the law. American, through SABRE, is a provider of wire or electronic communication service and Jeter was acting within the scope of her employment to protect the rights and property of her employer by monitoring North Ranch's apparent misuse of American's electronic communication service. *See* 18 U.S.C. § 2511(2)(a)(i). Moreover, one of the parties to the communication (viz., American, as Jeter's employer) had consented to the monitoring. *See* 18 U.S.C. § 2511(2)(d). There was no error. *See United States v. Shirley*, 884 F.2d 1130, 1134 (9th Cir. 1989).

VI

The appellants argue that the district court erred by failing to apportion the loss calculations between pre- and post-Guideline dates. Although mail and wire fraud offenses that straddle the Sentencing Guidelines' effective date of November 1, 1987, are not deemed to be continuing offenses and must be sentenced separately, a district court confronted with a situation like that presented in the instant appeals can avoid the risk of double-counting losses by sentencing concurrently on the pre- and post-Guideline counts. *See United States v. Niven*, 952 F.2d 289, 293-94 & n.2 (9th Cir. 1991) (per curiam). Because the district

court properly imposed concurrent sentences on the appellants' pre- and post-Guideline offenses, the sentences do not run afoul of *Niven*.

The appellants also contend that the district court erred by failing to explain how it arrived at a figure between $500,000 and $1,000,000 as the total loss suffered by American, particularly when the appellants' own figures represented a loss that was only 1% of the amount calculated by the government. It is the probable or intended loss resulting from a crime, however, not the actual loss suffered, that a district court must determine for sentencing purposes. *United States v. Hernandez*, 952 F.2d 1110, 1118 (9th Cir. 1991) (citing United States Sentencing Commission, *Guidelines Manual*, § 2F1.1 (Nov. 1989) ("U.S.S.G."), and *United States v. Davis*, 922 F.2d 1385, 1391 (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3285 (U.S. Oct. 13, 1992)). A product's fair market value ordinarily constitutes an appropriate measure of loss. *Hernandez*, 952 F.2d at 1118. In ascertaining a product's fair market value, "[t]he loss need not be determined with precision, and may be inferred from any reasonably reliable information available." *Id.* (quoting U.S.S.G. § 2B1.1, comment. (n.3)).

The record shows that the district court accepted and incorporated the presentence investigative reports' ("PSI") loss calculation exceeding $1.3 million in its findings on this point, and then discounted that figure to one falling between $500,000 and $1,000,000 to reflect the fact that the appellants did not profit from every ticket obtained. The district court's loss calculation was adequate under the circumstances. *See generally United States v. Avila*, 905 F.2d 295, 298-99 (9th Cir. 1990) (district court's incorporation of PSI findings sufficient for purposes of review where adequately supported by record).

VII

Winkleman

Winkleman argues that his sentence must be vacated and his case remanded for resentencing because (1) he should not have received a 4-level upward adjustment for his role in the offense; (2) he should have received either a 4-point downward adjust-

ment for his minimal part in the crime, or a 2-level downward adjustment for a minor role; and (3) in any event, his sentence of 48 months exceeded the Guideline range determined by the court.

The short answer to points (1) and (2) is that U.S.S.G. § 3B1.1(a) authorizes a 4-level upward adjustment in a defendant's offense level if he "was an organizer or leader of a[n extensive] criminal activity". The record reflects that Winkleman exercised decision making authority and, *inter alia*, recruited accomplices for a scheme that had at least three participants and used the unknowing services of many outsiders. *See* U.S.S.G. § 3B1.1, comment. (nn.2, 3). The district court did not err in making the 4-level upward adjustment and, *a fortiori*, it properly denied the request for 2- and 4-level downward adjustments.

The government concedes, however, that the district court erred in its imposition of a 48-month sentence. Winkleman's sentence must therefore be vacated and remanded for resentencing.

Rinker

Rinker argues that the district court erred not only by adjusting his offense level upward 2 points, but by failing to adjust his offense level downward either 2 or 4 points, based on his minor or minimal role in the offense. A court may adjust a defendant's offense level upward by 2 points if the defendant engaged in "more than minimal planning" in an offense involving fraud and deceit resulting in loss to the victim in excess of $2,000. U.S.S.G. § 2F1.1(b)(1)(2)(A). "More than minimal planning" is defined as, *inter alia*, "repeated acts over a period of time" or, if a single act, "more planning than is typical for commission of the offense in a simple form." U.S.S.G. § 1B1.1, comment. (n.1(f)). Such planning also "exists if significant affirmative steps were taken to conceal the offense." *Id.*

The record supports the PSI's finding on this point. Because the district court did not err by adjusting Rinker's offense level upward by 2 points, it necessarily follows that it did not err by rejecting Rinker's argument that he was entitled to a 2- or 4- level downward adjustment.

Mullins

Mullins argues that the district court erred by not departing downward in imposing his sentence, alleging that the court incorrectly believed that it lacked the discretion to do so. Because the record does not support this contention but indicates rather that the district court acted within its discretion in denying his request for a downward departure, we lack jurisdiction to review the district court's decision. *See United States v. Reyes*, 966 F.2d 508, 510 (9th Cir.), *cert. denied*, 61 U.S.L.W. 3285 (U.S. Oct. 13, 1992).

Because we find no merit to any of the appellants' remaining arguments, the judgments of conviction are all AFFIRMED. The sentences imposed on Mullins and Rinker are AFFIRMED. The sentence imposed on Winkleman is VACATED and REMANDED for resentencing.

APPENDIX
C

C-1

United States District Court
Central District of California

UNITED STATES OF AMERICA
vs.
JAMES ROBERT WINKLEMAN
Docket No. CR-90-409(A)-WMB
Social Security No. 557-84-4670

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date: Feb. 5, 1991.

☒ WITH COUNSEL: Phil Israels and Fred Heather, retained

PLEA: ☒ NOT GUILTY

FINDING: There being a verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of conspiracy in violation of 18 USC 371 — count 1; mail fraud in violation of 18 USC 1341 — counts 17, 18, 19, 20, 21; use of fictitious names in furtherance of a scheme to defraud in violation of 18 USC 1342 — count 22; wire fraud in violation of 18 USC 1343 — counts 2, 7, 10, 11, 12, 13, 14, 16.

JUDGMENT AND PROB./COMMITMENT ORDER: The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 48 months on each of counts 1, 2, 7, 10 through 14, and 16 through 22 with each of these sentences to run concurrently. The defendant is fined the sum of $250,000.00. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on the conditions that

he obey all Federal, State and Local laws; that he comply with the rules and regulations of the Probation Office and General Order 318; that he receive prior permission in writing from the Probation Officer for any employment he is going to accept; and that he participate in a drug abuse treatment and testing program if the Probation Officer deems it to be necessary.

THE COURT ORDERS that the defendant's present bond will be his bond on appeal and the defendant is to remain under the supervision of the Pre-Trial Services Agency during the time of the appeal with reports to be supplied to the Court every 4 weeks.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce the time period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue an order and revoke supervision for a violation occurring during the supervision period.

Signed By: ☒ U.S. District Judge Wm. Matthew Byrne, Jr.

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Dated/Filed: Feb. 11, 1991

LEONARD A. BROSNAN

By _____

APPENDIX
D

(SEAL U.S. DEPARTMENT OF JUSTICE

United States Attorney
Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

February 22, 1993

Ms. Cathy Catterson
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. James Robert Winkleman, et al.*
CA 90-50107, 08, and 09

Dear Ms. Catterson:

Pursuant to Circuit Rules 36-2 and 36-4, plaintiff-appellee United States of America requests publication of the Court's January 8, 1993 memorandum decision in the above-captioned matter on the grounds that the decision will clarify the admissibility of evidence regarding property rights under Title 18, United States Code, Sections 1341 and 1343.

Appellants Winkleman, Rinker, and Mullins appealed their convictions for conspiracy, mail fraud, and wire fraud arising out of their scheme to defraud American Airlines by transferring frequent flyer miles to fictitious accounts and then cashing in those miles for free airline tickets. They contended that the district court erred by not allowing the defense to introduce evidence establishing that the frequent flyer miles, and airline tickets obtained from them, were not things of "value" and therefore not property under the fraud statutes. Appellants further contended that even if property was taken, it was the property of the passengers, not of American, and the passengers abandoned this property. The panel rejected appellants' contentions.

The significance of the panel's decision is that it affirmed not just the district court's analysis of what is and what is not "property" under the fraud statues, but it affirmed the district court's decision to refuse to admit the evidence proffered by appellants regarding "lack of value". District courts often face the decision whether to admit such evidence. The government fears that too often district courts will decide that the safer course (the course least likely to raise uncertainties on appeal) is to permit the defense to introduce such alleged evidence of "lack of value". Even where district courts concur that such evidence is irrelevant, they may be unsure as to whether it is an issue of law or fact. As a consequence, the court may admit such evidence and rely on the jury to reject the evidence if it finds that such evidence does not comport with an instruction defining "property" under the fraud statutes.

Publishing the panel's decision will let district courts know that the issue, in a case analogous to the instant case, of whether a common carrier has been deprived of property, is an issue of law and not of fact. Publishing the panel's decision will give district courts the confidence to make appropriate evidentiary rulings, excluding as a matter of law such misleading "lack of value" evidence. Publishing the panel's decision would thereby allow for consistent treatment of these cases, allow for the more orderly administration of justice, and avoid confusion in future jury deliberations.

For the foregoing reasons, the government respectfully requests that the Court designate its memorandum as an opinion and, accordingly, authorize its publication.

Very truly yours,

TERREE A. BOWERS
United States Attorney

GARY S. LINCENBERG
Assistant United States Attorney
Deputy Chief, Training Section

cc: Fred Heather, attorney for appellants
Winkleman and Rinker
Devan Mullins, attorney for appellant Mullins